

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA**

DANIEL HUBERT, individually and on	:	Civil Action No. 2:15-cv-01391-MRH
behalf of all others similarly situated,	:	
	:	
Plaintiff,	:	Oral Argument Requested
	:	
v.	:	This Document Relates
	:	All Actions
	:	
	:	
GENERAL NUTRITION CORPORATION,	:	
	:	
Defendant.	:	
	:	
(In re: GNC Picamilon/BMPEA Litigation)	:	

**PLAINTIFFS' STATEMENT IN RESPONSE TO COURT ORDER TO SHOW
CAUSE AS TO WHY THIS ACTION SHOULD NOT BE STAYED**

Plaintiffs oppose staying this action pending a ruling on the *Estrada v. Johnson & Johnson* action now pending in the Third Circuit Court of Appeals. Such a stay is inappropriate because a ruling in *Estrada* is unlikely to resolve the issues in this action, and because this action was initially filed more than two years ago but is still at a preliminary stage.

It is not clear whether, and to what degree, a ruling in *Estrada* will affect the outcome of this case. To begin with, less than 10% of Third Circuit appeals result in a precedential opinion. U.S. Court of Appeals for the Third Circuit Practice Guide at 25, available at www.thirdcircuitbar.org. Few of those rulings effect change in existing law.

And even a precedential ruling may have limited applicability to this case. *Estrada v. Johnson & Johnson*, Civ. No. 16-7492, 2017 WL 2999026 (D.N.J. July 14, 2017) concerns standing for economic damages where a manufacturer did not disclose health risks associated with the product, but the plaintiff did not suffer any physical injury. *See id.* at *2. The *Estrada* District

Court found that in purchasing a product that caused no injury, Estrada received what she paid for, so she had no standing to sue for damages. *See id.* at *7, *9.

This action, by contrast, concerns marketing of an *illegal* product, and alleges both misrepresentations and non-disclosure respecting the product's legality. Plaintiffs paid for lawful dietary supplements, but received unlawful products. *See* Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss Second Amended Complaint, Dkt. 97, at 9-10 (distinguishing District Court opinion in *Estrada*).

Additionally, a stay will be prejudicial to Plaintiffs here. The stay in this case may be quite lengthy. The *Estrada* appeal was filed in September 2017, and briefing will not be closed until April 2018. As a rough measure of the likely time for an appellate ruling in a complex case, we examined the three most recent Third Circuit published opinions cited by the parties briefing the instant motion. In each, between 18 and 35 months passed from notice of appeal to ruling. *See Cottrell v. Alcon Laboratories*, 874 F.3d 154 (3d Cir. 2017) (notice of appeal filed April 28, 2016; decision October 18, 2017); *In re Fosamax/Alendronate Sodium Products Liability Litigation*, 822 F.3d 268 (3d Cir. 2017) (notice April 17, 2014; decision March 22, 2017); *In re Asbestos Products Liability Litig.*, 822 F.3d 125 (3d Cir. 2016) (notice March 27, 2014; decision May 16, 2016). This suggests we can expect a ruling in *Estrada* between the Spring of 2019 and Summer of 2020.

This case has been pending for quite some time. The first of the consolidated actions was filed on October 27, 2015, yet discovery has not even begun. Further delays will undoubtedly hamper the Plaintiffs' ability to prove their case:

[A] significant delay with unknown limits would cause [plaintiff] unnecessary prejudice. Memories fade, records are lost or destroyed as time wears on, and employees get fired, are transferred, or quit. On the other hand, the defendant would not be prejudiced if the stay is denied because it would experience no harm by engaging in discovery and motion practice.

The harm to the plaintiff in granting a stay is greater than any harm to the defendant if the stay were denied.

Richardson v. Verde Energy USA, Inc., No. 15-cv-6325, 2016 WL 4478839 at *2 (E.D. Pa. Aug. 25, 2016) (declining to stay ruling on a dismissal motion pending a decision on an appeal in a similar case). A one to two year stay would be antithetical to the admonition in Fed. R. Civ. Proc. 1 that civil actions “should be administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”

Dated: February 7, 2018

Respectfully submitted,

/s/ Shanon J. Carson

Shanon J. Carson, Esquire (Pa. ID No. 85957)

Arthur Stock, Esquire (Pa. ID No. 64336)

Berger & Montague, P.C.

1622 Locust Street

Philadelphia, PA 19103

Telephone: (215)875-4656

Facsimile: (215) 875-4604

scarson@bm.net

astock@bm.net

Gary E. Mason, Esquire

Jennifer S. Goldstein, Esquire

Whitfield Bryson & Mason, LLP

5101 Wisconsin Avenue NW

Suite 235

Washington, D.C. 20016

Telephone: (202) 429-2290

Facsimile: (202) 429-2294

gmason@wbmlp.com

jgoldstein@wbmlp.com

Co-Lead Counsel

D. Aaron Rihn, Esquire
Robert Peirce & Associates, P.C.
707 Grant Street, Suite 2500
Pittsburgh, PA 15219-1918
Telephone: (412) 281-7229
Facsimile: (412) 281-4229
arihn@peircelaw.com

Gregory F. Coleman, Esquire
Mark E. Silvey, Esquire
Lisa A. White, Esquire
Greg Coleman Law, P.C.
First Tennessee Plaza
800 S. Gay Street, Suite 1100
Knoxville, TN 37929
Telephone: (865) 247-0090
Facsimile: (865) 522-0049
greg@gregcoleman.law
mark@gregcolemanlaw.com
lisa@gregcolemanlaw.com

John Yanchunis, Esquire
Marcia Valladares, Esquire
Patrick A. Barthle II, Esquire
Rachel L. Soffin, Esquire
Morgan & Morgan
Complex Litigation Group
201 North Franklin Street, 7th Floor
Tampa, Florida 33602
Telephone: (813) 223-5505
Facsimile: (813) 223-5402
jyanchunis@forthepeople.com
mvalladares@forthepeople.com
pbarthle@forthepeople.com
rsoffin@forthepeople.com

Janine Pollack, Esquire
Michael Liskow, Esquire
Wolf Haldenstein Adler Freeman & Herz LLP
270 Madison Avenue
New York, New York 10016
Telephone: (212) 545-4600
Facsimile: (212) 545-4653
pollack@whafh.com
liskow@whafh.com

Theodore B. Bell, Esquire
Carl Malmstrom, Esquire
Wolf Haldenstein Adler Freeman & Herz LLP
One South Dearborn St., Suite 2122
Chicago, IL 60603
Telephone: (312) 984-0000
Facsimile: (312) 212-4401
tbell@whafh.com
malmstrom@whafh.com

Robert K. Shelquist, Esquire
Craig S. Davis, Esquire
Rebecca A. Peterson, Esquire
Lockridge Grindal Nauen P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
Telephone: (612) 339-6900
Facsimile: (612) 339-0981
rkshelquist@locklaw.com
cdavis@locklaw.com
rapeterson@locklaw.com

Eric H. Gibbs, Esquire
Andre M. Mura, Esquire
Caroline Corbitt, Esquire
Girard Gibbs LLP
601 California Street, 14th Floor
San Francisco, CA 94108
Phone: (415) 981-4800
Facsimile: (415) 981-4846
ehg@girardgibbs.com
amm@girardgibbs.com
ccc@girardgibbs.com

Attorneys for Plaintiffs